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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1033

RALPH J. TAUSSIG, ET UX., PETITIONERS

v.

WELLINGTON EQUITY FUND, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

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(See Appendix C, *infra*)

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v.

WELLINGTON FUND, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Ralph J. Taussig and Sally G. Taussig, his wife, as tenants by the entireties, shareholders of Wellington Fund, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on January 23, 1963.

OPINIONS BELOW.

The opinion of the District Court (452a-527a) [1] is reported at 187 F. Supp. 179. The opinion of the court below, printed in Appendix A, *infra*, pages 23-40, is reported at 313 F. 2d 472.

1. Record references are to pages of the JOINT AND CONSOLIDATED APPENDIX (3 volumes) printed for use of the court below. Nine copies have been filed under the provisions of this Court's Rule 21.

JURISDICTION.

The judgment of the court below, printed in Appendix B, *infra*, page 41, was entered on January 23, 1963; it affirms in Nos. 13,704 and 13,705 in the court below, judgments of the District Court entered on July 12, 1961 and July 31, 1961, denying an accounting. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Should fiduciaries of an investment company—the investment adviser and principal underwriter of such investment company—which have profited by unlawful appropriation of the name and goodwill of such investment company, be required to account to such investment company for the profits and unjust enrichment realized as a consequence of their intentionally fraudulent conduct.

STATUTES INVOLVED.

The opinion of the court below refers [2] to various Sections of the Investment Company Act, 15 U. S. C. 80a-1 *et seq.* These and other Sections of the Act which are referred to in this petition are printed in Appendix C, *infra*, pages 42-53.

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2. The court below denied respondents' motion to strike petitioners' brief in Nos. 13,704 and 13,705 in which petitioners urged the court below to decide on the existing record violations of various Sections of the Investment Company Act. The court below decided the case, as did the District Court (520a), solely as one of common law unfair competition.

STATEMENT OF THE CASE.

This is a shareholders' suit by two shareholders of Wellington Fund, Inc. ("Wellington Fund") who sue derivatively on behalf of Wellington Fund itself and representatively on behalf of its many shareholders. The court below affirmed the District Court in holding that respondents—fiduciaries of Wellington Fund—wilfully appropriated the name and goodwill of Wellington Fund for their own advantage. The court below affirmed the District Court's refusal to order an accounting by respondents to Wellington Fund for their profits and unjust enrichment. This petition seeks on behalf of Wellington Fund the opportunity of such an accounting.

Wellington Fund is a Delaware corporation organized in 1928. Since 1940 it has been a publicly[3] held investment company registered under the Investment Company Act. Wellington Fund became a nominal defendant in the District Court ". . . because of the peculiar nature of a shareholder's derivative suit" (526a); Wellington Fund is, however, the real party in interest and would benefit by the accounting sought. Petitioners—shareholders of Wellington Fund—commenced this case on October 3, 1958 as a shareholders' suit.[4] They file the present petition, in effect, as trustees *ad litem*, of the shareholders of Wellington Fund and of Wellington Fund itself.

Respondents are also Delaware corporations; one is also a publicly held registered investment company; two

3. Wellington Fund presently has more than 350,000 shareholders; assets of more than $1,400,000,000; and more than 100,000,000 shares outstanding, making it among the *five* largest corporations in the nation in number of shareholders.

4. The officers and directors of Wellington Fund have holdings in the aggregate of less than ¼ of 1 per cent of its outstanding shares (460a). As to proxy control of investment companies, see A STUDY OF MUTUAL FUNDS, *Prepared for the Securities and Exchange Commission by the Wharton School of Finance and Commerce, H. R. Rep. No. 2274, 87th Cong. 2d Sess.* (1962), chapter II, 37-73.

are corporations owned by Walter L. Morgan,[5] president and a director of Wellington Fund.

Wellington Equity Fund, Inc. ("Wellington Equity Fund"), respondent herein, was incorporated on August 26, 1958. When the complaint in this case was filed on October 3, 1958 Wellington Equity Fund was a closed-end investment company. On October 3, 1958 it became an open-end[6] investment company with redeemable shares upon completion of an initial public offering of 3,000,000 of its shares and receipt of net proceeds of $33,124,000.

The Wellington Company,[7] respondent herein, acts under contract as the investment adviser[8] and principal

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5. The District Court said: "Walter L. Morgan is undeniably the dominant figure in this narrative. He is president and director of each of the defendants. In addition, with respect to defendant [The] Wellington Company, he is the beneficial and record holder of the common stock and substantially all of the preferred stock. He is also beneficial and record holder of substantially all of the common stock of defendant Wellington [Company] Ltd. and together with members of his family owns a majority of its preferred stock. In this litigation Mr. Morgan chose to align himself with the corporations which are, in effect, his alter ego. . . ." (526a).

6. Wellington Fund and Wellington Equity Fund are management, open-end, diversified, investment companies. Sections 3, 4(3), 5(a)(1) and 5(b)(1) of the Investment Company Act, Appendix C, infra. Wellington Fund has the investment objectives of a so-called "balanced fund" and Wellington Equity Fund those of a so-called "common stock fund".

7. Five officers of Wellington Fund are officers or directors of The Wellington Company; three other officers of Wellington Fund are also employees of The Wellington Company (455a).

8. Section 2(a)(19) of the Investment Company Act, Appendix C, infra. Under Section 15(a)(3) (Appendix C, infra) any investment advisory contract may be terminated by the investment company—". . . on not more than sixty days' written notice to the investment adviser . . .". On April 12, 1952 Wellington Fund and The Wellington Company entered into an investment advisory contract; this was extended each year, and was in effect at the time of suit (651a-654a). During the pendency of this litigation and as of April 13, 1959 the investment advisory contract was transferred from respondent The Wellington Company to another corporation, *Welling-*

underwriter[9] of Wellington Fund; also as the principal underwriter of Wellington Equity Fund. Wellington Company, Ltd., respondent herein, acts under contract as the investment adviser[10] of Wellington Equity Fund.

Prior to the dissemination of its prospectus on October 6, 1958 (801a), public announcement[11] was made of the organization of a new investment company under the name Wellington Equity Fund. On September 4, 1958 petitioners' representatives, by letter and meeting, expressed their concern to Morgan, in part, over, (1) the ". . . improper appropriation . . ." of the name of Wellington

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ton Management Company—not a party herein (458a-459a, 655a-658a, 634a-645a).

In January 1960 (872a), during the pendency of this litigation, *Wellington Management Company* and Morgan (through respondent The Wellington Company, which changed its name during the pendency of this litigation to *Wellington Research and Development Co.*) and Welch and Young, also directors of Wellington Fund, received $6,644,400 for the public sale of 450,000 shares of *Wellington Management Company*, representing one-half of the non-voting shares. Morgan (through *Wellington Research and Development Co.*) received $6,237,600, and he continues to own all the voting stock of *Wellington Management Company* (872a).

9. Section 2(a)(28) of the Investment Company Act (Appendix C, infra). On December 1, 1953 Wellington Fund and The Wellington Company entered into an underwriting contract; this was extended each year, and was in effect at the time of suit. During the pendency of this litigation, and as of July 16, 1959 the underwriting contract was transferred from The Wellington Company to another corporation, *Wellington Company, Inc.*—not a party herein—which is a wholly owned subsidiary of *Wellington Management Company* (872a).

10. Wellington Company Ltd. has acted as Wellington Equity Fund's investment adviser since the organization of Wellington Equity Fund. In 1960 Wellington Company, Ltd. also became a subsidiary of *Wellington Management Company*, and Wellington Company, Ltd. changed its name to *The Wellington Company, Ltd., of Delaware* (872a).

11. The District Court found that ". . . The Red Herring Prospectus heralding the creation of the new fund contained the unique Wellington Fund oval as did certain preliminary advertising. Plaintiffs apprised defendants of this situation, and as a consequence, Wellington Equity Fund no longer employs the oval" (487a).

Fund, (2) ". . . the potential unfair competition . . ." to Wellington Fund by the new corporation, and (3) ". . . the potential conflict of interests . . ." (24a). Petitioners' representatives told Morgan that the name Wellington ". . . was, in the field of publicly held investment companies, the sole property of Wellington Fund, Inc., as a corporate entity . . .", and that it ". . . could not be used by the management or any group of officers or directors or stockholders, or any individual stockholder for his own private purposes" (25a). Morgan told petitioners' representatives that the Wellington name and goodwill belonged to him (or to The Wellington Company owned by him) (25a, 43a), and he rejected all of the petitioners' proposals (25a) for resolution of the controversy. Thereafter, petitioners instituted this suit.

The complaint charges, in part, that the creation of Wellington Equity Fund, and the adoption and use of the Wellington name by Wellington Equity Fund, constitute both an actionable violation of federal rights and a violation of the common law of unfair competition (463a). Trial was had before the Chief Judge of the District Court for the District of Delaware on June 15-18, 1959. On August 11, 1960 the District Court filed its opinion, which comprises its findings of fact and conclusions of law (527a).

Diversity of citizenship not having been established, the District Court found in the complaint an assertion of federal question jurisdiction adequate under the doctrine of pendent jurisdiction to permit the consideration by the District Court of the common law claim (463a-470a, 513a-521a). The District Court did not, however, adjudicate the federal claims (520a), and injunctive relief was granted solely upon the common law claim. The District Court found that there had been an "overwhelming" and "conclusive" showing of unfair competition (486a); that the Wellington name is ". . . a strong mark and has acquired a secondary meaning" in the investment company

field (506a); that the use of the Wellington name is a ". . . valuable corporate asset" (503a); and that "There is simply no basis in law, or in fact . . ." for respondents' theory attributing the ownership of the name and goodwill of Wellington Fund to The Wellington Company because, at the particular time, The Wellington Company was, under its contracts, acting as the investment adviser and principal underwriter of Wellington Fund (482a).

On June 20, 1961 the District Court enjoined Wellington Equity Fund from using the name Wellington, and enjoined The Wellington Company and Wellington Company, Ltd., from using the Wellington name with reference to any investment company *other than* Wellington Fund.[12] The District Court denied petitioners' prayer on behalf of Wellington Fund for an accounting of the profits and unjust enrichment realized by Morgan's companies.[13] Respondents appealed to the court below from the District

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12. Since the District Court granted a supersedeas and stayed execution of its injunctive order (2a), Wellington Equity Fund has continued to use the Wellington name at all times since August 23, 1958.

13. The District Court provided for the eventual award to petitioners of a reasonable attorney's fee and costs, to be paid by Morgan's companies (527a); it was stipulated that the hearing on counsel fees should be deferred until after the determination of the appeals to the court below. The District Court observed that: "The Morgan position, that Wellington Company owns the contested name, was acquiesced in by the directors of Wellington Fund. Consequently, it was only by virtue of assertion of derivative rights that Wellington Fund was able to achieve the protection afforded by this Court" (526a-527a); that "It would be unconscionable for Wellington Fund to be saddled with plaintiffs' attorney's fees in view of the conduct of its president and directors;" and that "Similarly, to assess part of these expenses against the innocent shareholders of Equity Fund would not be in keeping with equitable principles." (527a) The District Court noted also that Morgan's companies ". . . stood the most to gain by conferring on Wellington Equity Fund the purported right to use" the Wellington name (527a). Petitioners sought in the courts below, and now seek, an accounting *solely* against Morgan's companies.

Court's injunctive order of June 20, 1961.[14] Petitioners appealed to the court below from the orders of the District Court denying an accounting.[15]

The court below affirmed the District Court's orders denying an accounting;[16] the court below also affirmed the District Court's injunctive order, finding that the District Court had, to use the words of the court below, correctly determined:

> . . . (1) that in the investment company field valuable goodwill attached to and was symbolized by the name "Wellington", (2) that this goodwill was property of Wellington Fund which could not be lawfully appropriated by a new investment company calling itself Wellington Equity Fund and (3) that the consent of the directors of Wellington Fund to this appropriation was invalid. (Appendix A, *infra*, page 29.)

Petitioners seek review of the judgment of the court below which affirms the orders of the District Court relieving the Morgan companies from an accounting to Wellington Fund for the profits and unjust enrichment realized as a result of their wilful and fraudulent appropriation of Wellington Fund's name and goodwill.

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14. The appeal of The Wellington Company, Wellington Company, Ltd. and Wellington Equity Fund became No. 13,702 in the court below. The petition for certiorari in No. 924 in this Court, March 12, 1963, seeks review of the judgment of the court below in No. 13,702, affirming the District Court's injunction.

15. The District Court's order of July 12, 1961 denies an accounting; its order of July 31, 1961 is essentially the same, except that it contains the District Court's certification under Federal Rule 54(b). Petitioners' appeals from these orders became Nos. 13,704 and 13,705 (consolidated) in the court below. The present petition seeks review of the judgment of the court below in Nos. 13,704 and 13,705 (Appendix B, infra, p. 41).

16. The court below observed, however, that the use of the Wellington name by Wellington Equity Fund "served to popularize the new Equity Fund *to its advantage and to the advantage of the advisory and promotional corporations* which would earn substantial fees and commissions if the new venture should prosper" (Appendix A, infra, p. 36) (Emphasis added); also that Wellington Equity Fund ". . . is trading on the reputation . . ." of Wellington Fund. (Id. p. 33)

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below conflicts with the Congressional purposes embodied in the Investment Company Act. A fiduciary of an investment company can not be allowed to abuse his trust and at the same time unjustly profit by such abuse. The decision of the court below, in effect, invites violation of fiduciary trust without any danger of incurring responsibility to disgorge the unjust enrichment realized. A mere injunction does not satisfy the equities of this case: a decision granting an accounting is needed.

2. Such a decision would vitalize the vehicle of the shareholders' private suit, designed to police—along with the Securities and Exchange Commission—the activities of investment companies.

3. By rejecting definitively the "corporate shell" theory of an investment company espoused by the tortfeasors, such a decision of this Court would serve as a salutary directive to the lower federal courts in their determination of the numerous pending suits involving investment companies.

4. During the more than 20 year history of the Investment Company Act this Court has not decided any case involving an investment company. Such a decision is necessary at the present time to reaffirm the Congressional intent in the Investment Company Act to impose serious obligations upon those who act as fiduciaries of an investment company—officers, directors, investment advisers and principal underwriters.

5. The grant of an accounting by the tortfeasors is required by the applicable decisions of this Court.

ARGUMENT.

I.

Unfair Competition Having Been Found, Wellington Fund Is Entitled to the Opportunity of an Accounting for the Profits and Unjust Enrichment Which Followed and Which It Was Found Were the Very Objective of the Unlawful Appropriation of Wellington Fund's Name and Goodwill.

While injunctive relief may, henceforth, provide partial redress to Wellington Fund, the effect of failing to grant an accounting is to invite further and more subtle torts, without any fear of monetary sanction, and to unjustly enrich the tortfeasors.

Respondents' contentions in the court below which are now presented to this Court in the petition in No. 924, (March 12, 1963), are based upon the following conceptions:

——Wellington Fund is a mere corporate "shell" or "conduit" (473a, n. 47). It does not "amount to anything" (336a).

——The Wellington Fund name and goodwill symbolize no business conducted by Wellington Fund, but only the business of The Wellington Company,[17] owned by Morgan (471a).

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17. Respondents contended in the court below, and assert in this Court in the Petition in No. 924, March 12, 1963, that the court below erred in giving the right to use the Wellington name to Wellington Fund because Wellington Fund "... can make no other use of it and realize no monetary benefit from it" (p. 12), and that only The Wellington Company can do so. This contention is a direct corollary of the "corporate shell" thesis. The Investment Company Act, however merely tolerates—it does not require—the existence of an external investment adviser. The District Court pointed out that there are investment companies which do not have external advisers (498a, n. 117). When the complaint was filed in this case, Wellington Equity Fund was, as a matter of fact, a *closed-end* company, and as

—Wellington Fund engages in "no business at all", and it would "shrivel and die" very promptly without the services of The Wellington Company.[18]

—The directors of Wellington Fund, as directors of a corporate "shell", have no real functions; should have no independence;[19] and they have effectively "assigned" the job of managing Wellington Fund to The Wellington Company (125a).

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has been pointed out, "Now most closed-end and some open-end investment companies have their own investment staff as well as their own officers and other personnel". Jaretzki, *The Investment Company Act: Problems Relating to Investment Advisory Contracts*, 1950, 45 VA. L. REV. at 1024. A former member of the staff of the Securities and Exchange Commission has stated: "Indeed, the directors of the investment company undoubtedly have an obligation to determine whether any service contract is to be preferred *over the direct assumption of investment operations by the investment company itself*". (Emphasis added.) Greene, *Fiduciary Standards of Conduct under the Investment Company Act of 1940*, 1950, 28 GEO. WASH. L. REV. 266, 278, n. 39, citing *Hearings on S. 3580 before a Subcommittee of the Senate on Banking and Currency, 76th Cong. 3d Sess.* at 251-252. Despite the Congressional intent, contrast the following conclusion of a recent survey, A STUDY OF MUTUAL FUNDS, p. 67:

> This pervasive interpenetration of executive personnel, taken in conjunction with the fact that open-end companies are almost invariably organized by a management group associated with the adviser, and the present limitations on the role of independent directors, *suggests that open-end investment companies are typically legal shells without genuine autonomy, controlled by external management interests*. (Emphasis added.)

[18] Defendants-respondents argued in the District Court: "... *Wellington Fund is actually engaged in no business at all*. It would *shrivel and die* very promptly without investment management of the kind furnished by the management company and without the distribution activities of the sponsor" (Emphasis added). BRIEF OF DEFENDANTS SUR REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, APPENDIX, p. 15-a.

[19] In No. 13,702 in the court below respondents argued that:

> ... Congress obviously approved this view. It did not intend to approve the system of advisory contracts with professional managers on the one hand and to destroy it in effect, on the other, *by requirements of independence on the board of directors* ..." (Emphasis added). BRIEF FOR DEFENDANTS-APPELLANTS, p. 47.

——Since Wellington Fund is a "shell" and its name and goodwill symbolize the business of The Wellington Company—wholly owned by Morgan—Morgan alone has the right (through The Wellington Company) to determine whether Wellington Equity Fund should bear the Wellington name.

Respondents' "corporate shell" theory, petitioners suggest, is disingenuously asserted, and is plainly contrary to the Investment Company Act and to the Congressional intent to impose on the managers of other people's money (mostly small investors) the highest possible fiduciary standards.[20] Petitioners think the very assertion of respondents' thesis that one of the nation's largest[21] cor-

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20. *Brown v. Bullock*, D. C. S. D. N. Y., 1961, 194 F. Supp. 207, affirmed, 2d Cir., 1961, 294 F.2d 415; *Aldred Investment Trust v. Securities and Exchange Commission*, 1st Cir., 1945, 151 F. 2d 254, certiorari denied, 1946, 326 U. S. 795; *McClure v. Borne Chemical Co.*, 3rd Cir., 1961, 292 F. 2d 824; Eisenberg & Phillips, *Mutual Fund Litigation—New Frontiers for the Investment Company Act*, 1962, 62 COL. L. REV. 73; Comment, *The Mutual Fund and its Management Company: An Analysis of Business Incest*, 1961, 71 YALE L. J. 137; Greene, *Fiduciary Standards of Conduct under the Investment Company Act of 1940*, 1959, 28 GEO. WASH. L. REV. 266; Comment, *Protecting the Interests of Mutual-Fund Investors in Sales of Management-Corporation Control (or, Policing the Traffic in Other People's Money)*, 1958, 68 YALE L. J. 113; A STUDY OF MUTUAL FUNDS, op. cit. supra, n. 3, *passim*, and especially chapters I and II, 1-74. A lone commentator has supported respondents' espousal of the "corporate shell" theory: Lobell, *The Mutual Fund: A Structural Analysis*, 1961, 47 VA. L. REV. 181; *Rights and Responsibilities in the Mutual Fund*, 1962, 70 YALE L. J. 1258; *A Critique of the Wharton School Report on Mutual Funds*, 1963, 49 VA. L. REV. 1.

21. A representative of the Securities and Exchange Commission proposed during the hearings on the Investment Company Act that after an open-end company had assets of $150,000,000, it should become closed-end. Significantly, in 1940, $150,000,000 was the value of the common stocks held in the portfolios of the 49 largest insurance companies—*Hearings on S. 3580 Before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess.* at 245-250. Today the size of Wellington Fund is about *10 times* this suggested limit.

porations is a "shell" or "conduit"—bespeaks a situation of considerable public importance. Petitioners think this Court should grant the present petition to consider, in part, respondents' contentions [22] that Wellington Fund is a mere "corporate shell".

II.

The Decision of the Court Below, Rejecting, in Effect, Respondents' Plea That Special Principles—Foreign to Those of the Investment Company Act—Be Held Applicable to Investment Companies Should Be Reinforced by a Decision of This Court.

Respondents argued to the District Court (incorrectly, as shown in the brief *amicus curiae* filed by the Securities

22. The following excerpts from the petition in No. 924, March 12, 1963, filed by respondents herein, show that they still urge upon this Court the "corporate shell" thesis:

> . . . In giving Wellington Fund the right to control the use of the name by other funds they [the courts below] are noticeably silent on the subject of what goods or services are offered or what business activity is conducted by Wellington Fund with respect to which the name has value to it. (p. 10)
>
> . . . there are no such goods, services or business activity of the fund in this market place; the *only* services offered are those of the adviser-sponsor. These are what the investor buys when he purchases fund shares. (Ibid.)
>
> . . . this misconceives defendants' [respondents'] position which is that the Wellington name signifies advisory and sales services to investors, those being the only services available in the mutual fund market place. (p. 11)
>
> . . . the transactions in that market place do not provide it [Wellington Fund] with any direct financial benefits . . . . Only the sponsor and adviser profit by the transactions in this market place; the sponsor by his share of the sales commission and the adviser by the addition of a client for his services. (p. 12)
>
> . . . The right to use the name in this market place is given to an entity which can make no other use of it and realize no monetary benefit from it; the only one who can make such use of it is denied the right. (Ibid.)
>
> . . . Wellington Fund engages in no business activity in this market place . . . . The sponsor is busy in this market place

and Exchange Commission in the court below) that their peculiar views [23] had been approved [24] by the Commission.

The District Court observed that respondents' contentions, in part, were an admission that ". . . the interests of Wellington Fund are secondary, and those of the closely held management and distributing companies paramount,

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selling shares and thereby attracting new investors to the services of the adviser. . . . (pp. 12-13)

. . . yet neither the corporate form nor principles of corporate law have any bearing on unfair competition which deals with the conduct of business enterprises in the marts of trade. Mutual fund adviser-sponsors have ingeniously adapted the corporate form to an entirely new and novel use . . . (p. 14)

23. Respondents argued to the District Court that petitioners herein asked that court:

> . . . to enjoin that which their own directors have approved. They argue that practices which have been followed in this industry openly, and publicly for many years are wrong and improper. They ask the Court to enjoin that which the S. E. C. and the State regulatory bodies, who have specific responsibility to prevent the wrongs which Plaintiffs say exist here, have found entirely proper. They asked the Court to forbid that which their fellow stockholders overwhelmingly approved at their meeting in April of 1959. It would appear that everyone who has anything to do with the fourteen billion dollar mutual fund industry is out of step but the plaintiffs with their 211 shares.
>
> Most of the Plaintiffs' objections appear to be based upon a dissatisfaction with what a mutual fund is and what it does, or better does not do. . . . Since the plaintiffs apparently do not like mutual funds and the mutual fund industry, they ought to exercise their clearly provided right of redemption and not seek to re-model the entire industry to their own satisfaction through the Courts. BRIEF OF DEFENDANTS SUR REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW, pp. 74-75.

24. The court below granted the application of the Securities and Exchange Commission to file a brief *amicus curiae* to set forth its disagreement with arguments advanced in respondents' briefs therein. The Commission asserted, in part (in opposition to respondents' contentions in the court below) that implied civil rights of action flow from violations of Section 35(d); that no inference should be drawn from the non-action of the Commission in proceeding against respondents; and that the directors of an investment company are under an obligation to assure that their investment company obtains the best possible investment advice.

notwithstanding, that principals in control of these closely held companies occupy positions requiring the exercise of the highest degree of fidelity to Wellington Fund" (510a). The District Court refused to accept respondents' contentions, which would, in the words of the District Court, permit them ". . . . to function outside the carefully delimited boundaries of corporate law" (477a); and held that the investing public should not ". . . have its rights determined by concepts so foreign to established principles" (499a). The District Court stated that it was unwilling to ". . . forsake 262,000 investors with holdings of $858 million in favor of a corporation controlled by one person, Walter L. Morgan, who is also president and director of Wellington Fund" (477a); and that it was unwilling to hold that Wellington Fund ". . . is the captive of one man, Walter L. Morgan" (479a).

III.

A Decision of This Court Rejecting the "Corporate Shell" Theory of an Investment Company Espoused by Respondents Would Constitute a Useful Directive to the Lower Courts, in Which a Number of Cases Involving Investment Companies Are Presently Pending.

During the entire history of the Investment Company Act this Court has not decided a single [25] case involving an investment company; a decision of the question presented by this petition, at a time when the Investment Company Act itself is being reassessed [26] by the agency charged with

25. Petitions were denied in *Aldred Investment Trust v. Securities and Exchange Commission*, 1946, 326 U. S. 795, and in *Securities and Exchange Commission v. Insurance Securities Incorporated etc.*, 1938, 358 U. S. 823. This Court granted the petition in *Brouk v. Managed Funds, Inc.*, 1961, 366 U. S. 958, but the case was subsequently mooted, 1962, 369 U. S. 424. This Court has thus never decided whether violations of the Investment Company Act give rise to implied civil rights of action.

26. A STUDY OF MUTUAL FUNDS, op. cit. supra n. 17, pp. v-vii. Chapter XI of the S. E. C.'s REPORT OF SPECIAL STUDY OF SECURITIES MARKETS, will deal with open-end investment companies.

its administration, would be appropriate. "For almost twenty years after its enactment in 1940, the Investment Company Act was regarded as an area of comparative calm in the turbulent area of securities litigation".[27] But there are presently a number[28] of derivative shareholders suits pending in the lower courts which were brought after 1958. Since these suits involve claims that fiduciaries[29] of investment companies—officers, directors, investment advisers and principal underwriters—have been faithless,[30]—a decision involving the "corporate shell" theory and its consequences as espoused by respondents would be relevant to issues raised in these pending cases.

IV.

The Grant of an Accounting in Favor of Wellington Fund Is, Petitioners Submit, Required by the Views of this Court.

Since October 6, 1958 The Wellington Company and Wellington Company, Ltd.—Morgan's companies—have been engaged[31] jointly, as principals, with Wellington

27. Eisenberg and Phillips, op. cit. supra, n. 20 at 73.

28. Eisenberg and Phillips, op. cit. supra, note 20 at 74, point out that since 1959 more than 50 law suits involving over 20 of the nation's largest and best known investment companies, their directors and investment advisers have been filed in various federal and state courts. It is also reported that in March 1961 there were about 60 derivative suits pending involving 30 investment companies. 71 YALE L. J. cit. supra, n. 20, at 137, note 1.

29. Under Section 36 of the Investment Company Act any person who serves or acts as officer, director, investment adviser or principal underwriter occupies a *fiduciary* position with regard to such investment company (Appendix C, infra).

30. "In essence, the complaints charge that the funds are being operated and managed in the interests of their investment advisors and underwriters and the officers and directors of the funds who are affiliated with these organizations, rather than in the interests of the funds' shareholders." Eisenberg and Phillips, op. cit. supra, note 20 at 82.

31. A supersedeas was granted below and Wellington Equity Fund is presently using the Wellington name, and has used it since August 23, 1958.

Equity Fund, in the commission of the tort of unfair competition. An injunction, prospective only in effect, does not, petitioners submit, satisfy the substantial equities of this case. The character of the conduct which gave rise to the unfair competition is such that mere injunctive relief is inadequate; it does not provide Wellington Fund with any redress for respondents' use of Wellington Fund's name and good will since August 23, 1958. In *Champion Spark Plug Co. v. Sanders*, 1947, 331 U.S. 125, 130, this Court observed ". . . where unfair competition is established, any doubts as to the adequacy of the relief are generally resolved against the transgressor".

The conduct in the present case was knowing,[32] willful, fraudulent,[33] and a breach of fiduciary obligation. Morgan affixed the Wellington name to Wellington Equity Fund, not as a charitarian, but for the profit for his two service companies, and the courts below have recognized the advantages these companies did receive. The question, therefore, is whether The Wellington Company and Wellington Company, Ltd.—Morgan's alter egos—should be compelled to account to the shareholders of Wellington Fund, the owner of the name, for profits and unjust enrichment realized as a fruit of the tort. The appropriation of the Wellington name for the use of Wellington Equity Fund, and for the advantage of the Morgan companies, was not innocent. It was intentional and deliberate, and was persisted in despite strong protest. Wellington Equity Fund is using the name today, and in the words of the Court of Appeals, using it to ". . . the advantage of the advisory and promotional corporations which would earn substantial fees and commissions if the new venture should prosper" (Appendix A, *infra*, p. 36). Respondents have utilized a valuable cor-

32. "It must also be remembered that defendants are not unwitting or innocent infringers . . . . They gambled on the advice of counsel that an infringement suit would not be brought against them. They lost . . . ." *Williamson-Dickie Mfg. Co. v. Davis Mfg. Co.*, 3rd Cir. 1958, 251 F. 2d 924, 927.

33. 1 Nims, UNFAIR COMPETITION AND TRADEMARKS (4th ed. 1947) 246, 2 Id. 1081-1113.

porate asset belonging to Wellington Fund to their advantage. "To impose on the infringer nothing more serious than an injunction when he is caught is a tacit invitation to other infringement."[34]

After a finding of unfair competition, the profits realized by the wrongdoers are allowed as an equitable measure of compensation on the theory of a trust *ex maleficio* and of restitution.[35] *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 1916, 240 U. S. 251, 259; *cf. Sheldon v. Metro Goldwyn Pictures Corp.*, 1940, 309 U. S. 390, 399. It is to be presumed that the wrongdoer who makes profits from the sales of goods bearing a trade name belonging to another was enabled to do so because he was drawing upon the goodwill generated by the other's trade name. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 1942, 316 U. S. 203. In any accounting, the burden is on the tortfeasors to show that the infringement had no cash value to them. The tortfeasors, in order to reduce the profits for which they would otherwise be answerable, have to show to what extent their profits were demonstrably, *not* attributable to the infringement. Id. at 207.

V.

All of the Prerequisites for an Accounting for Respondents' Profits Are Present.

The sums received by the Morgan companies are specific and ascertainable. The burden would be on the Morgan companies to show the amounts, if any, which should be deducted from their receipts, in ascertaining the amounts to be paid to Wellington Fund upon the accounting. The

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34. *Admiral Corporation v. Price Vacuum Stores*, D. C. E. D. Pa., 1956, 141 F. Supp. 796, 801.

35. Section 136, RESTATEMENT OF RESTITUTION states the rule that "A person who has tortiously used a tradename . . . or other similar interest of another is under a duty of restitution for the value of the benefits received thereby."

following two items, as a minimum,[36] petitioners submit should be included:

First, amounts of gross sales commissions[37] realized by The Wellington Company from the sale of Wellington Equity Fund shares between October 23, 1958 and July 16, 1959. (On the latter date, during the pendency of this litigation, the principal underwriting contract was transferred from The Wellington Company to *Wellington Company, Inc.*) During that period The Wellington Company sold

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36. Petitioners also urged in the courts below the following items of unjust enrichment for which there should be an accounting: (a) amounts representing the *use* value of the Wellington name measured, for example, by an estimated licensing fee arrangement between Wellington Fund and Wellington Equity Fund; (b) sums received by the Morgan companies as advisory fees and underwriting commissions which they were not entitled, as *disloyal* fiduciaries, to retain; (c) the amount of *savings* of expenses achieved through use of the Wellington name in the initial underwriting of $30,000,000. The District Court made findings relevant to item (c). The District Court found, for example, that "The principal reason Wellington Equity Fund had a successful initial underwriting was because of the tremendous reputation Wellington Fund enjoys among the investing public" (499a). The District Court found also that ". . . There is no question Wellington Equity Fund's underwriting was enhanced by having the name 'Wellington' . . ." (524a), and the District Court pointed out that one of respondents' expert witnesses testified that ". . . Wellington Fund had a more successful underwriting by reason of its employing the name 'Wellington' " and that another acknowledged that ". . . the underwriting of Wellington Equity Fund was made more successful by virtue of the existence and success of Wellington Fund" (487a).

37. The principal underwriting contract between Wellington Equity Fund and The Wellington Company of October 6, 1958 provides, in pertinent part, that The Wellington Company ". . . in full satisfaction of all services herein agreed to be performed by it in this Agreement shall *retain a sum equal to 8% of the offering price* of all shares of [Wellington] Fund sold by it after the effective date hereof . . . " (740a) (Emphasis added). For the period October 23, 1958 to April 30, 1959 The Wellington Company received compensation of $481,052 under the said contract. On July 19, 1959 The Wellington Company ceased to be principal underwriter; *Wellington Company, Inc.* (a subsidiary of *Wellington Management Company*) became the principal underwriter of Wellington Fund. For the period October 23, 1958 to October 31, 1959, The Wellington Company (and *Wellington Company, Inc.*) received compensation of $767,677.

shares bearing the infringing trade name and trade mark. It is to be presumed that all [38] shares of Wellington Equity Fund were sold solely because of the magnetism of the Wellington name.

Second, as charged in the complaint (11a, ¶ 13) the advisory fees [39] to Wellington Company, Ltd. have been *double* [40] that which would have been realized under the Wellington Fund—The Wellington Company contract. There should be an accounting by Wellington Company, Ltd. for amounts representing at least *one-half* of the advisory fees received by Wellington Company, Ltd., from October 23, 1958 to date—Wellington Company, Ltd. having since the operation of Wellington Equity Fund as an open-end investment Company on October 23, 1958 acted as its investment adviser. The amounts of these advisory fees are specific and ascertainable. It is to be presumed, under equitable

38. While it is arguable that had Wellington Equity Fund *not* been created, sales of shares of Wellington Fund itself would have been made by The Wellington Company in an identical amount, it is to be presumed that investors in Wellington Equity Fund were attracted not only by the famous Wellington name, but, in addition, by the "common stock" investment company objectives of Wellington Equity Fund, which were prominently advertised. In any event such an argument would be irrelevant since Wellington Equity Fund *was* created using the Wellington name and The Wellington Company *did* realize large amounts as a result of its tort.

39. For the period October 23, 1958 to April 30, 1959 Wellington Company, Ltd. received advisory fees of $87,828 and for the period October 23, 1959 to October 31, 1959 advisory fees of $187,480. For the year ended October 31, 1960 Wellington Company, Ltd. received advisory fees of $215,273.

40. Wellington Fund pays an advisory fee to The Wellington Company computed on the basis of ½ of 1% on the first $70,000,000 annually of the average net assets; ⅜ of 1% on the next $50,000,000; and ¼ *of 1%* on all assets *over* $120,000,000. Under its advisory contract Wellington Equity Fund pays an advisory fee to Wellington Company, Ltd. computed on the basis of *½ of 1%* annually. Since the assets of Wellington Fund have been for years well above $120,000,000, Wellington Fund pays an advisory fee on all sums above $120,000,000 of ¼ of 1%. The percentage rate which Wellington Equity Fund pays is thus *twice* the effective percentage rate paid by Wellington Fund.

doctrine, that the initial capital of Wellington Equity Fund received on October 23, 1958, as well as the capital received from the sale of shares of Wellington Equity Fund thereafter, was received as a direct result of the magnetism of the Wellington name. Since the rate of advisory fee paid by Wellington Equity Fund has been twice the effective rate paid by Wellington Fund, one-half of all amounts received by Wellington Company, Ltd. are *necessarily* amounts which would never have been realized at all by Morgan save for the tort.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APRIL 1963.

APPENDIX A TO PETITION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,702
13,703
13,704
13,705

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES

v.

WELLINGTON FUND, INC.,
WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY, AND
WELLINGTON COMPANY, LTD.,
DELAWARE CORPORATIONS

WELLINGTON EQUITY FUND, INC.,
THE WELLINGTON COMPANY,
WELLINGTON COMPANY, LTD.,
Appellants in 13,702

WELLINGTON FUND, INC.,
Appellant in 13,703

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES,
Appellants in 13,704 and 13,705.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Submitted July 23, 1962

Before: KALODNER, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 23, 1963)

By HASTIE, *Circuit Judge*.

In this stockholders' derivative suit the district court decided that the adoption and use of the name "Wellington" by Wellington Equity Fund, an open-end, diversified, management investment company, constituted unfair competition in relation to Wellington Fund, Inc., a similar enterprise which had become well and favorably known as a large, active and successful mutual fund long before the 1958 organization of Wellington Equity Fund as a new investment company.

The plaintiffs are stockholders of Wellington Fund, Inc., and sue in the interest of that corporation and its stockholders, although the corporation itself is formally designated as a defendant. The other defendants, against whom relief is sought, are the above mentioned Wellington Equity Fund and two related enterprises. Defendant Wellington Co., Ltd., is the investment adviser of Wellington Equity Fund. Defendant Wellington Co. is sued as distributor of both Wellington Fund and Wellington Equity Fund, and as investment adviser of Wellington Fund.[1] All of the defendants are Delaware corporations.

The complaint charged that the adoption and use of the name "Wellington" by Wellington Equity Fund constituted both an actionable violation of federal rights derived from the Investment Company Act of 1940, 54 STAT. 789, 15 U. S. C. § 80a, and a violation of the common law [2] of unfair

1. A subsequent transfer of these functions from Wellington Co. to other corporations is of no present consequence.

2. The court below discussed but did not decide whether Delaware law or so-called federal common law determined the legality of the challenged adoption of the name "Wellington". Nothing turns on that choice of law here. No relevant peculiarity of Delaware law appears in the cases. Rather, the Delaware courts in their search for

competition. The same relief, an injunction and monetary recovery, was sought under both the statutory claim and the common-law claim.

Diversity of citizenship not having been established, the district court found in the complaint an assertion of federal question jurisdiction, adequate under the doctrine of pendent jurisdiction to permit the consideration of the common-law claim as well. Relief was then granted solely upon the common-law claim. 187 F. Supp. 179, 220. More particularly, Wellington Equity Fund was enjoined from using the name "Wellington", and the advisory and distributing corporations were enjoined from using that name with reference to any investment company other than Wellington Fund. The prayer of the plaintiffs for damages and an accounting was denied. Wellington Equity Fund and the two associated corporations have appealed from the granting of injunctive relief. The plaintiffs have appealed from the denial of damages and an accounting.

Jurisdiction is our first concern. The alleged violation of the common law of unfair competition, standing alone, would not have been within federal jurisdiction. But here, the coupling of this basis of recovery with a contention that the conduct of the defendants also violated fed

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controlling general principles of unfair competition have relied largely upon the body of law developed in federal decisions. See, *e.g.*, *American Radio Stores, Inc. v. American Radio & Television Stores Corp.*, 1930, 17 Del. Ch. 127, 130-131, 150 Atl. 180, 182. *Cf. Hygienic Specialties Co. v. H. G. Salzman, Inc.*, 2d Cir. 1962, 302 F.2d 614, 619 n. 9. Nevertheless, we observe in passing that a strong case can be made for applying state law in situations of this kind, see *National Fruit Product Co. v. Dwinell-Wright Co.*, D. Mass. 1942, 47 F. Supp. 499, 502-504, *aff'd*, 1st Cir. 1944, 140 F.2d 618, as is done in diversity cases alleging unfair competition, *Pecheur Lozenge Co. v. National Candy Co.*, 1942, 315 U. S. 666. Moreover, the particular issues contested here—the legality of the adoption of part of the name of one Delaware corporation by another and the legal characterization of the conduct of the directors of the first corporation in consenting to the appropriation—may well be viewed as matters of special concern to the state of incorporation and peculiarly within its regulatory competence.

eral statutes is said to bring the alleged violation of state law within the so-called pendent jurisdiction of a federal court.

Decision on this jurisdictional point is simplified in this case by the fact that the relief sought is the same on both legal grounds. Moreover, this case does not involve the often vexatious question whether the factual basis for the federal statutory relief is substantially different from the factual basis of the asserted common-law right or, as the issue is often stated, whether the suit presents a single cause of action. Here, it is clear that essentially the same facts are relevant whatever the liability-creating law may be. The one issue requiring discussion is whether the asserted federal statutory claim is substantial enough to justify the adjudication of the coupled common-law claim. In other words, the debatable matter is whether federal question jurisdiction is established as a basis for ancillary jurisdiction.

The leading cases on pendent jurisdiction hold that an actual right to relief under some federal statute need not be established to justify adjudication of the merits of a coupled common-law claim. *Hurn v. Oursler*, 1933, 289 U. S. 238; *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 1938, 305 U. S. 315. The common-law claim must be dismissed only if the coupled federal contention is "plainly unsubstantial either because obviously without merit, or 'because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy' ". *Levering & Garrigues Co. v. Morrin*, 1933, 289 U. S. 103, 105-106. See also *Bell v. Hood*, 1946, 327 U. S. 678, 681-683.

Thus, we must consider whether such "unsubstantiality" characterizes the claim that the use of the name "Wellington" by Wellington Equity Fund violates a federal right derived from the Investment Company Act of 1940. In the court below the starting point for this inquiry

was Section 35(d) of the statute, 54 STAT. 840, 15 U. S. C. § 80a-34(d), which provides:

> "It shall be unlawful for any registered investment company hereafter to adopt as a part of the name or title of such company . . . any word or words which the Commission finds and by order declares to be deceptive or misleading. The Commission is authorized to bring an action in the proper district court of the United States or United States court of any Territory or other place subject to the jurisdiction of the United States alleging that the name or title of any registered investment company, or of any security which it has issued, is materially deceptive or misleading."

Under this section a district court would have jurisdiction to adjudicate a claim by the Securities and Exchange Commission that the use by one open-end, diversified, management investment company of an identifying part of the name of another should be enjoined in order to avoid harm resulting from the confusion of investors as to the identity of either fund or the investment opportunity it offers to the general public. But this is just the beginning of the reasoning required to establish federal question jurisdiction over the present private civil suit. The plaintiffs must argue that once the federal statute has made it legally wrong for an investment company to adopt a name that is materially deceptive or misleading, it is within the authority of a federal court to provide a civil remedy to anyone aggrieved by that wrong, even though the special remedy Congress has provided for the wrong is of a different character. It is arguable on the one hand that in this situation it should be implied that the remedy provided by Congress is exclusive, as has been done with reference to the National Labor Relations Act. *Cf. Amalgamated Util. Workers v. Consolidated Edison Co.*, 1940, 309 U. S. 261. On the other hand, it is arguable, as has been

held in certain cases under the Securities Exchange Act of 1934, that a court may properly afford civil relief to a person injured by deceptive conduct which Congress has declared unlawful, even in the absence of an express provision for such a remedy. *Cf. Baird v. Franklin*, 2d Cir., 1944, 141 F. 2d 238, 244-245, *cert. denied* 323 U. S. 737; Note, 1948, 61 HARV. L. REV. 858.

More generally, it is frequently held that a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party. *Texas & Pac. Ry. v. Rigsby*, 1916, 241 U. S. 33; *Tunstall v. Brotherhood of Locomotive Firemen*, 1944, 323 U. S. 210. 2 RESTATEMENT, TORTS § 286. To apply that doctrine here would require a conclusion that section 35(d) is legislation for the protection, not only of those contemplating investment, but also of investors and investment companies already in the field. Nothing has been pointed out in the legislative history of the Investment Company Act of 1940 which bears upon this point, and it may reasonably be doubted whether Congress adverted to it. However, congressional contemplation of implied private rights of action may be suggested by a provision of section 44 of the Act, 54 STAT. 844, 15 U. S. C. § 80a-43, giving the district courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of" the Act. No provision of the Act expressly grants private rights of action, yet the quoted language seems to provide a forum for such suits.

The sum of all this is that it is legally debatable whether the right which plaintiffs assert can properly be derived from the Investment Company Act of 1940. For conflicting views of a similar question under another section of the Act, contrast *Brown v. Bullock*, 2d Cir., 1961, 294 F. 2d 415, with *Brouk v. Managed Funds, Inc.*, 8th Cir. 1961, 286 F. 2d 901, *vacated as moot*, 1962, 369 U. S. 424. Certainly such a contention is not frivolous. It is not fore-

closed by any decision of the Supreme Court. And, finally, it would be particularly difficult for this court to deny the substantiality of the contention since we have recognized the existence of an implied private right to relief in somewhat analogous circumstances under the Securities Exchange Act of 1934. See *Slavin v. Germantown Fire Ins. Co.*, 1949, 174 F. 2d 799; *Speed v. Transamerica Corp.*, 1956, 235 F. 2d 369, *aff'g* D. Del. 1951, 99 F. Supp. 808, s.c., D. Del. 1947, 71 F. Supp. 457. We hold, therefore, that the district court had federal question jurisdiction over the cause of action asserted under section 35(d) of the Investment Company Act of 1940 and pendent jurisdiction to determine whether the conduct in suit constituted common law unfair competition.

We come now to the merits of the unfair competition claim. In substance, the court below found (1) that in the investment company field valuable good will attached to and was symbolized by the name "Wellington", (2) that this good will was property of Wellington Fund which could not lawfully be appropriated by a new investment company calling itself Wellington Equity Fund and (3) that the consent of the directors of Wellington Fund to this appropriation was invalid.

For many years before 1958, Wellington Fund had provided the investor who bought its shares a proportional interest in a "balanced" multi-million dollar portfolio of securities. The Fund is committed to conservative investment policies with the stated and well publicized objectives of "conservation of principal, reasonable income return, and profits without undue risk". Through the purchase of Wellington Fund shares the small investor obtains the benefit of a diversification of holdings and a continuity of skilled management services that would otherwise be beyond his reach. Since this is an "open-end" fund, it continually offers to sell additional shares in the enterprise and to redeem outstanding shares. The attractive features of the fund and its success as an instrumentality for profitable

yet conservative investment have been widely advertised, with Wellington Fund billed as "A Name To Remember When Investing". In brief, by 1958 Wellington Fund had become one of the largest and most highly regarded mutual funds, with nearly 250,000 shareholders and assets worth $750,000,000.

All of this was frankly recognized by the organizers of the new Equity Fund in their choice of a corporate name featuring "Wellington". Indeed, these organizers were members of the management group which was already engaged in promoting Wellington Fund and guiding its investments. They acted pursuant to their conviction that it would be good business to enable dealers marketing the balanced Wellington Fund also to have a common stock fund under their management available for less conservative investment by persons whose primary objective was growth of capital and increasing gain. They believed that the name "Wellington" would be valuable to the new enterprise, enabling it to benefit from the success and good reputation of Wellington Fund.

In these circumstances, the defendants do not deny the value of the Wellington name; rather, they argue that the right to exploit its good will in the investment company field belongs to the management company which itself bears the name Wellington and made that name popular and valuable through the skillful promotion and management it provided for Wellington Fund. This argument makes it necessary to determine whether it was the mutual fund itself or the associated management company which the investing public held in high esteem. This is a question of fact. The court below considered and disposed of this question, saying:

> "Until entry into the field by Wellington Equity Fund in 1958, Wellington Fund has had the exclusive continuous use of the 'Wellington' name in the investment company arena since 1935. Defendants' use of the name has been primarily in conjunction with invest-

ment advisory and underwriting services. The public's contact with the name 'Wellington' has almost exclusively been with Wellington Fund. In fact, this Court was surprised when two of defendants' expert witnesses, particularly knowledgeable in the investment company field, could not name Wellington Fund's investment adviser. No greater knowledge can be imputed to the investing public. Further evidence 'Wellington Fund' is the trade name that has achieved public acceptance and that the noninvestment companies bearing the 'Wellington' name are little known to the investing public is borne out by the many corporate changes in name and in function that the noninvestment companies have undergone." 187 F. Supp. at 214.

Our own examination of the record satisfies us that the trial court's conclusion is adequately supported by evidence.

The additional contention that the advisory and promotional services of the management company added value to the name "Wellington" does not strengthen the defendants' position. These services were contractual undertakings performed for Wellington Fund. Their effective performance would necessarily create a favorable public image of the Fund and any investment opportunity it should sponsor. That reputation is no less the property of Wellington Fund because services or commodities obtained from others may have contributed to it. *Cf. Radio Shack Corp. v. Radio Shacks, Inc.*, 7th Cir. 1950, 180 F. 2d 206. In return for conferring this benefit upon the Fund, Wellington Company received an agreed consideration in the form of management fees and sales commissions which, in the single year preceding the organization of the Equity Fund, aggregated more than two million dollars. It is entitled to nothing more, certainly not to treat as its own property the good will it created for its client.

Apart from these considerations peculiar to the organization and interrelation of the defendant corporations, the normal essentials of unfair competition are present in this case. "Wellington" had been established as the identifying name of a mutual fund. Danger of confusion is inherent in the adoption of that name by a new mutual fund. Although that danger is lessened to a degree by the fact that the new enterprise is a common stock fund while the older one is a balanced fund, the record shows that common stocks normally constitute more than half the value of Wellington Fund's portfolio. In such circumstances, there is substantial basis for apprehension that the ordinary investor will confuse the two enterprises, at least to the extent of attributing to Wellington Fund some sponsorship of the new fund bearing the Wellington name. The result is that Wellington can no longer be sure "that its reputation shall be of its own making alone". *Time, Inc. v. Ultem Publications, Inc.*, 2d Cir. 1938, 96 F. 2d 164, 165. Such appropriation of another's name and reputation "is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful". *Yale Electric Corp. v. Robertson*, 2d Cir. 1928, 26 F. 2d 972, 974. We think it is clear from what has already been said that in this case "the borrower's use is [not] so foreign to the owner's as to insure against any identification of the two".

We have not overlooked a contention of the defendants that there is no impropriety in the identification of the two enterprises in the public mind because both are now served by the same investment adviser. But, even so, situations may arise in which eventuation of the greater risks involved in the common stock fund will cause the investment experience of that fund to reflect unfavorably upon its supposed sponsor. Moreover, it is not required and should

not be assumed in the adjudication of this controversy that the two funds will continue to employ the same investment adviser indefinitely. Indeed, the Investment Company Act of 1940 limits the duration of advisory contracts, empowers investment companies to terminate them at will and without cause, and requires periodic shareholder ratification of such contracts. 54 STAT. 812, 15 U. S. C. § 80a-15. We are satisfied that, in appropriating the Wellington name, the new Equity Fund is trading on the reputation of the pre-existing Wellington Fund in a way that is not legally permissible without the consent of Wellington Fund.

The defendants' final point presents entirely different considerations. Evidence was introduced to show that the directors of Wellington Fund, seeking to serve the interests of that corporation, consistent with the interests of the Wellington Company and the new Equity Fund, consented to the use of the name Wellington by the new corporation. It is argued that this action constituted effective consent by Wellington Fund. If this position is sound, the plaintiff stockholders are also foreclosed, because they sue derivatively on behalf of Wellington Fund. *Schleiff v. Baltimore & O. R. R.*, Del. Ch. 1955, 130 A. 2d 321.

Formal approval of the use of the name Wellington by the new common stock fund occurred at the September 25, 1958 meeting of the Board of Directors of Wellington Fund, although the proposal had been discussed and had evoked favorable comment at an earlier meeting. The resolution of the board read as follows:

> "After full discussion of the matter and upon motion duly made, seconded and carried, it was
>
> "*Resolved*, That the Board continues to be of the opinion that the use of the name 'Wellington Equity Fund, Inc.' by that Corporation in connection with its common stock fund is in the best interests of Wellington Fund, Inc.,

> "*Further Resolved,* That the prior action of the Board and of the officers in approving the use of the name 'Wellington Equity Fund, Inc.' by that Corporation as a common stock fund is hereby formally reaffirmed, ratified, and approved;
>
> "*Further Resolved,* That the proper officers of this Corporation be, and they hereby are, authorized to execute and deliver, in the name of this Corporation, to Wellington Equity Fund, Inc., any instruments of license, consent or approval which may be necessary or advisable, in their sole discretion, to evidence the approval of this Corporation, whether or not such approval may be required, of the use by Wellington Equity Fund, Inc., of that name."

As Wellington Fund shareholders, the present plaintiffs promptly protested that this action was improper and invalid.

In resolving this issue, the district court reasoned that under Delaware law a gift of corporate assets, unless made to a charitable corporation, required unanimous stockholder approval. See *Frankel v. Donovan*, Ch. 1956, 35 Del. Ch. 433, 435 n. 2, 120 A. 2d 311, 312 n. 2. The court then found that the directors' resolution was "nothing more than the gift of a valuable corporate asset". 187 F. Supp. at 211.

The defendants have strongly argued to us that the questioned action was not a "gift" of the right to exploit corporate good will but rather a licensing of the use of the Wellington name which in the best business judgment of the directors would benefit all concerned, including Wellington Fund itself. They contend that it was improper for the district court to substitute its evaluation of the transaction for the honest judgment of the directors.

It is true that courts of equity have refused to substitute their judgment for the judgment of independent and

disinterested directors who have honestly concluded that a proposed disposition of corporate assets will result in a justifying benefit to the corporate transferor. *Beard v. Elster*, Del. 1960, 160 A. 2d 731. However, that rule does not apply when a majority of the directors are not disinterested in the proposed transaction. *Kennedy v. Emerald Coal & Coke Co.*, Sup. Ct. 1944, 28 Del. Ch. 405, 42 A. 2d 398, *cert. denied*, 1945, 324 U. S. 872; *Italo-Petroleum Corp. v. Hannigan*, 1940, 40 Del. (1 Terry) 534, 14 A. 2d 401; *Keenan v. Eshleman*, Sup. Ct. 1938, 23 Del. Ch. 234, 2 A. 2d 904. In this case, eleven of the thirteen members of the Wellington Fund board constituted the entire board of the new Wellington Equity Fund, which they authorized to use the Wellington name. When directors are thus interested in and obligated to both transferor and transferee, a court of equity is not obligated to accept the directors' judgment, but may and, indeed, should require them to prove to the court's satisfaction that the disposition of a valuable asset has been equitable. *Geddes v. Anaconda Copper Mining Co.*, 1921, 254 U. S. 590, 599, cited with approval in *Keenan v. Eshleman*, *supra* at 243-44, 2 A. 2d at 908; *Sterling v. Mayflower Hotel Corp.*, Sup. Ct. 1952, 33 Del. Ch. 293, 298, 314, 93 A. 2d 107, 110, 118-19; *Kennedy v. Emerald Coal & Coke Co.*, *supra* at 414-415, 42 A. 2d at 402; *Potter v. Sanitary Co. of America*, Ch. 1937, 22 Del. Ch. 110, 194 Atl. 87.

Turning to the merits of the directors' action, it is clear that the new corporation gave nothing to the Wellington Fund in exchange for permission to adopt the Wellington name as its own. But even though there was no consideration in a technical contractual sense, we have carefully examined the record for evidence of benefit to Wellington Fund as a result of the questioned transaction. Several witnesses did testify that some benefit to Wellington Fund was anticipated. In substance, their testimony was that a number of the independent securities dealers who handle the nationwide marketing of Wellington Fund shares had

expressed a desire to be able to offer to their customers a common stock fund. Fear was expressed that, in a period when common stock funds were increasing in popularity, many dealers might lose interest in Wellington Fund unless they were enabled to offer to their customers a common stock fund under the management and sponsorship which had made Wellington Fund an attractive choice for investors interested in balanced funds. In addition, the actual experience of dealers since 1958 shows that both funds have prospered.

We think this line of proof falls short of the mark. It may be that the interest of dealers in Wellington Fund shares was enhanced by enabling them also to handle a common stock fund enjoying the same advisory services. But this does not establish that naming the new fund "Wellington" would be or was helpful to the pre-existing Wellington Fund. To the contrary, we think the inference is permissible that this choice of a name, as distinguished from the availability of a new common stock fund by whatever name, served to popularize the new Equity Fund, to its advantage and to the advantage of the advisory and promotional corporations which would earn substantial fees and commissions if the new venture should prosper. Particularly revealing was the testimony of W. L. Morgan, who organized Wellington Fund [3] and was the president, a director and sole owner of the common stock of Wellington Company. He said:

> "It seems to me that if I spent money—Wellington Company spent money for twenty-five years advertising the name 'Wellington', you [sic] would not want to call it [the new Equity Fund] Locust Street or something."

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3. Wellington Fund has grown from an investment pool for personal clients of Mr. Morgan, an investment counsellor, to one of the nation's largest mutual funds. Mr. Morgan continues to serve as president of the corporation and as a director.

In brief, the services of the Morgan promotional and investment management organization having contributed to the good will of the Wellington name, it seemed sensible to use that good will in making the new venture profitable to that organization. Such testimony indicates the difficulty the Wellington Fund directors must have experienced in any effort to distinguish the interest of the shareholders of Wellington Fund from other interests which they also wished to promote.

In these circumstances, we cannot say that the district court was clearly wrong in finding as it did that "Wellington Fund was not the recipient of any discernible benefit", 187 F. Supp. at 212, from naming the new fund "Wellington". Consequently, the district court must be upheld in its rejection of this defense.

It remains to consider the plaintiffs' appeal from the refusal of the trial court to award them either damages or an accounting for profits. With reference to damages the trial court found that it had not been proved that Wellington Fund had suffered monetary loss as a result of the existence or activity of Wellington Equity Fund. This conclusion is supported by evidence that sales of Wellington Fund shares and their value continued to increase in a substantial way after shares of Wellington Equity Fund were placed on the market. Conceding this continuing prosperity of Wellington Fund, plaintiffs have sought to avoid its impact by urging as a basis for their damage claim that, but for Wellington Equity Fund, it would have been possible for Wellington Fund to have enlarged its earnings by converting into a common stock fund. However, there is not the slightest indication in the record that such a conversion would have occurred had the new common stock fund not been in the field. There is no evidence that the shareholders of Wellington Fund were dissatisfied with its conservative type of investment or with its earnings. Certainly, the directors of Wellington Fund, could not have changed the basic character and objectives of the Fund

without the consent of the shareholders, even if they had wished to do so. See Investment Company Act of 1940, § 13(a)(3), 54 STAT. 811, 15 U. S. C. § 80a-13(a)(3). In brief, it does not appear that the existence of the new common stock fund was even a *sine qua non* of Wellington Fund's failure to earn larger profits. The denial of damages was clearly proper.

Turning to the matter of accounting, the plaintiffs do not argue that Wellington Equity Fund should account to Wellington Fund for enrichment attributable to the use of the Wellington name. The court below pointed out that any assignment of money value to such enrichment would necessarily be entirely speculative. Moreover, the beneficiaries of any such gain are the shareholders of Wellington Equity Fund who have done no wrong. What plaintiffs do ask is that they be granted an accounting for fees and commissions earned by the advisory and underwriting corporations, Wellington Company and Wellington Company, Ltd., in the management of Wellington Equity Fund investments and the sale of its shares. But any right to such an accounting must be predicated upon some breach of a fiduciary duty owed by these service corporations to Wellington Fund. With reference to Wellington Company, the court below rightly ruled that "plaintiffs' contention the investment advisory contract should be construed as providing for exclusivity of services simply has no foundation in the record". 187 F. Supp. at 216. A fortiori, Wellington Co., Ltd., which contracted to serve as underwriter for Wellington Equity Fund but was a stranger to Wellington Fund, had no fiduciary obligation to Wellington Fund in connection with the commissions it earned on sales of Wellington Equity Fund shares.

Where unfair competition has been proved, relief is fashioned pursuant to the equities of the case at hand, often with the result that the wrongful conduct is enjoined without any attendant award of monetary compensation. *Champion Spark Plug Co. v. Sanders*, 1947, 331 U. S. 125;

National Van Lines v. Dean, 9th Cir. 1956, 237 F. 2d 688. The nature and interrelation of various interests in this vigorously and ably contested case made the task of the trial judge, seeking an equitable resolution of the controversy, difficult. We think he achieved that objective by restraining the use of the Wellington name and refusing to award damages or to order an accounting.

The judgment will be affirmed.

SMITH, *Circuit Judge*, dissenting.

This action is essentially one for unfair competition governed by common law principles. The majority holds that "the district court had federal question jurisdiction over the cause of action asserted under section 35(d) of the Investment Company Act of 1940, and pendent jurisdiction to determine whether the conduct in suit constituted common-law unfair competition." This holding is based on the view that the cited section creates an implied right enforceable in a private civil action in the district court. I disagree.

We are in accord with the majority view that in the proper case "a breach of statutory duty which causes injury to one of the class that the statute serves to protect affords by implication a sufficient basis for a private civil suit by the injured party." The principle is well established; however, in our opinion the express language of section 35(d), supra, precludes its application in the instant case.

The pertinent provisions of the cited section read as follows:

> "It shall be unlawful for any registered investment company hereafter to adopt as a part of the name or title of such company, or of any security of which it is the issuer, any word or words WHICH THE COMMISSION FINDS AND BY ORDER DECLARES TO BE DECEPTIVE OR MISLEADING. The Commission is authorized to bring an action in the proper district court of the United

States * * * alleging that the name or title of any registered investment company, or of any security which it has issued, is materially deceptive or misleading. If the court finds that the Commission's allegations in this respect, taking into consideration the history of the investment company and the length of time which it may have used any such name or title, are established, the court shall enjoin such investment company from continuing to use any such name or title." (Emphasis supplied).

The statutory prohibition is cast in specific terms which may not be disregarded. The section prohibits only the adoption of "any word or words which THE COMMISSION FINDS AND BY ORDER DECLARES to be deceptive or misleading." (Emphasis supplied). This is a clear expression of Congressional intent that illegality will attach to the conduct of a registered investment company only after such a finding and declaration by the Commission. The authority to enforce the prohibition by appropriate civil action is vested in the Commission.

We are of the opinion that the quoted provision cannot be construed as creating an implied right enforceable in a private civil action. *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174 (1915). The principle announced in the cited case is applicable here. "It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes'." Ibid. See also *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, 378 and 379 (1958). We are of the view that the federal question is not substantial and that under the cases cited in the majority opinion there is no basis for pendent jurisdiction.

APPENDIX B TO PETITION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 13,704 and 13,705.

RALPH J. TAUSSIG AND SALLY G. TAUSSIG, HIS WIFE, AS TENANTS BY THE ENTIRETIES,

Appellants,

v.

WELLINGTON FUND, INC., WELLINGTON EQUITY FUND, INC., THE WELLINGTON COMPANY, AND WELLINGTON COMPANY, LTD., DELAWARE CORPORATIONS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE.

Present: KALODNER, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of July 12, 1961 and July 31, 1961 of the said District Court in this case be, and the same are hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

January 23, 1963

APPENDIX C TO PETITION.

The Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. 80a-1, *et seq.*:

FINDINGS AND DECLARATION OF POLICY.

SEC. 1. (a) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby found that investment companies are affected with a national public interest in that, among other things—

(1) the securities issued by such companies, which constitute a substantial part of all securities publicly offered, are distributed, purchased, paid for, exchanged, transferred, redeemed, and repurchased by use of the mails and means and instrumentalities of interstate commerce, and in the case of the numerous companies which issue redeemable securities this process of distribution and redemption is continuous;

(2) the principal activities of such companies—investing, reinvesting, and trading in securities—are conducted by use of the mails and means and instrumentalities of interstate commerce, including the facilities of national securities exchanges, and constitute a substantial part of all transactions effected in the securities markets of the Nation;

(3) such companies customarily invest and trade in securities issued by, and may dominate and control or otherwise affect the policies and management of, companies engaged in business in interstate commerce;

(4) such companies are media for the investment in the national economy of a substantial part of the national savings and may have a vital effect upon the flow of such savings into the capital markets; and

(5) the activities of such companies, extending over many States, their use of the instrumentalities of interstate commerce and the wide geographic distribution of their security holders, make difficult, if not impossible, effective State regulation of such companies in the interest of investors.

(b) Upon the basis of facts disclosed by the record and reports of the Securities and Exchange Commission made pursuant to section 30 of the Public Utility Holding Company Act of 1935, and facts otherwise disclosed and ascertained, it is hereby declared that the national public interest and the interest of investors are adversely affected—

(1) when investors purchase, pay for, exchange, receive dividends upon, vote, refrain from voting, sell, or surrender securities issued by investment companies without adequate, accurate, and explicit information, fairly presented, concerning the character of such securities and the circumstances, policies, and financial responsibility of such companies and their management;

(2) when investment companies are organized, operated, managed, or their portfolio securities are selected, in the interest of directors, officers, investment advisers, depositors, or other affiliated persons thereof, in the interest of underwriters, brokers, or dealers, in the interest of special classes of their security holders, or in the interest of other investment companies or persons engaged in other lines of business, rather than in the interest of all classes of such companies' security holders;

(3) when investment companies issue securities containing inequitable or discriminatory provisions, or

fail to protect the preferences and privileges of the holders of their outstanding securities;

(4) when the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed, or when investment companies are managed by irresponsible persons;

(5) when investment companies, in keeping their accounts, in maintaining reserves, and in computing their earnings and the asset value of their outstanding securities, employ unsound or misleading methods, or are not subjected to adequate independent scrutiny;

(6) when investment companies are reorganized, become inactive, or change the character of their business, or when the control or management thereof is transferred, without the consent of their security holders;

(7) when investment companies by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character of their junior securities; or

(8) when investment companies operate without adequate assets or reserves.

It is hereby declared that the policy and purposes of this title, in accordance with which the provisions of this title shall be interpreted, are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.

GENERAL DEFINITIONS.

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * *

(19) "Investment adviser" of an investment company means (A) any person (other than a bona fide officer, director, trustee, member of an advisory board, or employee of such company, as such) who pursuant to contract with such company regularly furnishes advice to such company with respect to the desirability of investing in, purchasing or selling securities or other property, or is empowered to determine what securities or other property shall be purchased or sold by such company, and (B) any other person who pursuant to contract with a person described in clause (A) regularly performs substantially all of the duties undertaken by such person described in clause (A); * * *

* * *

(28) "Principal underwriter" of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company. "Principal underwriter" of or for a closed-end company or any issuer which is not an investment company, or of any security issued by such a company or issuer, means any underwriter who, in connection with a primary distribution of securities, (A) is in privity of contract with the issuer or an affiliated person of the issuer; (B) acting alone or in concert with one or more other persons, initiates or directs the formation of an underwriting syndicate; or (C) is allowed a rate of gross commission, spread, or other profit greater than the

rate allowed another underwriter participating in the distribution.

* * *

DEFINITION OF INVESTMENT COMPANY.

SEC. 3. (a) When used in this title, "investment company" means any issuer which—

(1) is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

(2) is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or has been engaged in such business and has any such certificate outstanding; or

(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

* * *

CLASSIFICATION OF INVESTMENT COMPANIES.

SEC. 4. For the purposes of this title, investment companies are divided into three principal classes, defined as follows:

(1) "Face-amount certificate company" means an investment company which is engaged or proposes to engage in the business of issuing face-amount certificates of the installment type, or which has been engaged in such business and has any such certificate outstanding.

(2) "Unit investment trust" means an investment company which (A) is organized under a trust indenture, contract of custodianship or agency, or similar instrument,

(B) does not have a board of directors, and (C) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities; but does not include a voting trust.

(3) "Management company" means any investment company other than a face-amount certificate company or a unit investment trust.

SUBCLASSIFICATION OF MANAGEMENT COMPANIES.

SEC. 5. (a) For the purposes of this title, management companies are divided into open-end and closed-end companies, defined as follows:

(1) "Open-end company" means a management company which is offering for sale or has outstanding any redeemable security of which it is the issuer.

(2) "Closed-end company" means any management company other than an open-end company.

(b) Management companies are further divided into diversified companies and non-diversified companies, defined as follows:

(1) "Diversified company" means a management company which meets the following requirements: At least 75 per centum of the value of its total assets is represented by cash and cash items (including receivables), Government securities, securities of other investment companies, and other securities for the purposes of this calculation limited in respect of any one issuer to an amount not greater in value than 5 per centum of the value of the total assets of such management company and to not more than 10 percentum of the outstanding voting securities of such issuer.

(2) "Non-diversified company" means any management company other than a diversified company.

* * *

CHANGES IN INVESTMENT POLICY.

SEC. 13. (a) No registered investment company shall, unless authorized by the vote of a majority of its outstanding voting securities—

* * *

(3) deviate from its policy in respect of concentration of investments in any particular industry or group of industries as recited in its registration statement, or deviate from any fundamental policy recited in its registration statement pursuant to section 8(b)(2);

* * *

SIZE OF INVESTMENT COMPANIES.

SEC. 14. (a) * * *

* * *

(b) The Commission is authorized, at such times as it deems that any substantial further increase in size of inventment companies creates any problem involving the protection of investors or the public interest, to make a study and investigation of the effects of size on the investment policy of investment companies and on security markets, on concentration of control of wealth and industry, and on companies in which investment companies are interested, and from time to time to report the results of its studies and investigations and its recommendations to the Congress.

INVESTMENT ADVISORY AND UNDERWRITING CONTRACTS.

SEC. 15. (a) After one year from the effective date of this title it shall be unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company, unless in effect

prior to March 15, 1940, has been approved by the vote of a majority of the outstanding voting securities of such registered company and—

(1) precisely describes all compensation to be paid thereunder;

(2) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company;

(3) provides, in substance, that it may be terminated at any time, without the payment of any penalty, by the board of directors of such registered company or by vote of a majority of the outstanding voting securities of such company on not more than sixty days' written notice to the investment adviser; and

(4) provides, in substance, for its automatic termination in the event of its assignment by the investment adviser.

(b) After one year from the effective date of this title, it shall be unlawful for any principal underwriter for a registered open-end company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, except pursuant to a written contract with such company, which contract, unless in effect prior to March 15, 1940—

(1) shall continue in effect for a period more than two years from the date of its execution, only so long as such continuance is specifically approved at least annually by the board of directors or by vote of a majority of the outstanding voting securities of such company; and

(2) provides, in substance, for its automatic termination in the event of its assignment by such underwriter.

(c) In addition to the requirements of subsections (a) and (b) it shall be unlawful for any registered investment company having a board of directors to enter into, renew, or perform any contract or agreement, written or oral, except a written agreement which was in effect prior to March 15, 1940, whereby a person undertakes regularly to serve or act as investment adviser of or principal underwriter for such company, unless the terms of such contract or agreement and any renewal thereof have been approved (1) by a majority of the directors who are not parties to such contract or agreement or affiliated persons of any such party, or (2) by the vote of a majority of the outstanding voting securities of such company.

(d) It shall be unlawful for any person—

(1) to serve or act as investment adviser of a registered investment company, pursuant to a written contract which was in effect prior to March 15, 1940, after March 15, 1945, or the date of termination provided for in such contract, whichever is the prior date, or after assignment thereof subsequent to March 15, 1940, by the person acting as investment adviser thereunder; or

(2) as principal underwriter for a registered open-end investment company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, pursuant to a written contract which was in effect prior to March 15, 1940, after March 15, 1945, or the date of termination provided for in such contract, whichever is the prior date, or after assignment thereof subsequent to March 15, 1940, by the person acting as principal underwriter thereunder:

Provided, however, That the limitation to March 15, 1945, shall not apply in either case if prior to that date such contract is renewed in such form that it complies with the requirements of subsection (a) or (b) of this section, as the case may be, and is approved in the manner required by this section in respect of a contract of the same character made after March 15, 1940.

* * *

UNLAWFUL REPRESENTATIONS AND NAMES.

SEC. 35. * * *

* * *

(d) It shall be unlawful for any registered investment company hereafter to adopt as a part of the name or title of such company, or of any security of which it is the issuer, any word or words which the Commission finds and by order declares to be deceptive or misleading. The Commission is authorized to bring an action in the proper district court of the United States or United States court of any Territory or other place subject to the jurisdiction of the United States alleging that the name or title of any registered investment company, or of any security which it has issued, is materially deceptive or misleading. If the court finds that the Commission's allegations in this respect, taking into consideration the history of the investment company and the length of time which it may have used any such name or title, are established, the court shall enjoin such investment company from continuing to use any such name or title.

INJUNCTIONS AGAINST GROSS ABUSE.

SEC. 36. The Commission is authorized to bring an action in the proper district court of the United States or United States court of any Territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting in one or more of the following

capacities has been guilty, after the enactment of this title and within five years of the commencement of the action, of gross misconduct or gross abuse of trust in respect of any registered investment company for which such person so serves or acts:

(1) as officer, director, member of an advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If the Commission's allegations of such gross misconduct or gross abuse of trust are established, the court shall enjoin such person from acting in such capacity or capacities either permanently or for such period of time as it in its discretion shall deem appropriate.

* * *

JURISDICTION OF OFFENSES AND SUITS.

SEC. 44. The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any

liability or duty created by, or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended, and section 7, as amended, of the Act entitled "An Act to establish a court of appeals for the District of Columbia", approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against the Commission in any court.

* * *